83-355

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DWIGHT J. HOLTER AND SANDRA A. HOLTER,
individually and on behalf of others similarly situated,
Petitioners,

v.

MOORE AND COMPANY, WILLIAM M. MOORE,
individually, and TIMOTHY M. MILLER,
individually, and on behalf of a class composed of all other sales associates of Moore and Company acting as real estate agents for sellers of residential properties,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 29, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether for purposes of Section 1 of the Sherman Act, 15 U.S.C. § 1, a real estate sales company is incapable of combining or conspiring in restraint of trade with independent contractor sales associates as a matter of law.

2. Whether real estate sales companies can, under the Sherman Act, by contractual arrangement control the percentage and amount of commissions received by its independent contractor sales agents for participating in sales of residential real estate.

3. Whether there exists and is applicable here an exception to the antitrust intracorporate conspiracy doctrine for agents of a corporation who have an independent personal stake in an antitrust conspiracy involving them and their corporation.

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The opinion of the Court of Appeals has been reported at 702 F.2d 854 (10th Cir. 1983) and at 1983-1 Trade Reg. Rep. (CCH) ¶ 65,286, and is set forth in Appendix B, infra. The opinion of the District Court has not been reported, but is set out in Appendix A, infra.

JURISDICTION

1. Date of Judgment Sought to be Reviewed: March 21, 1983.

2. Date of Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc: June 10, 1983.

3. Statutory Provision Conferring Jurisdiction: The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved, the Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

1. Nature of the Case

The named petitioners sold their single-family residence in Fort Collins, Colorado in 1978 using the services of the named respondents, and paid them a real estate commission equal to 7% of the purchase price (App. A, pp. 25-26). Respondent Moore and Company is a licensed corporate real estate broker and Respondent Timothy M. Miller is a licensed real estate salesman who participated in the sale as an independent contractor to Moore and Company (App. A, pp. 25-26, 35, 8). Respondent William M. Moore is the real estate broker of Moore and Company under whose broker's license Moore and Company operates (App. A, pp. 25-26).

The action brought by the petitioners alleges that Moore and Company combined and conspired with independent contractor sales associates affiliated with that com-

pany to fix the commissions charged sellers of residential real estate at the rate of 7% of the gross sales price of such properties (App. A, p. 26). This price-fixing arrangement is alleged to be a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The action was brought as a plaintiffs' and defendants' class action (App. A, p. 26).

The trial court granted defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and dismissed the case prior to certification of either the plaintiff or defendant class. The Honorable Richard P. Matsch ruled that while sales associates of Moore and Company were independent contractors and had a personal stake in the business which Petitioners alleged constituted price-fixing of real estate commissions, the sales associates did not have an "independent" personal stake so as to dis-

tinguish them from Moore and Company (App. A). Thus, sales associates of Moore and Company were held as a matter of law to be incapable of combining or conspiring with that corporate defendant. The Tenth Circuit Court of Appeals affirmed Judge Matsch's decision (App. B), and Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc was denied by that appellate court.

2. Jurisdiction of the Trial Court

The trial court had jurisdiction below pursuant to 28 U.S.C. § 1337(a).

3. Undisputed Facts for Purposes of Summary Judgment Motion

Moore and Company is a general real estate brokerage firm specializing in residential, commercial, industrial and investment sales (App. A, p. 35). Approximately 80% of its business relates to residential sales (App. A, p.35). Like other real estate firms in Colorado and

nationwide, Moore and Company brings together buyers and sellers of residential real estate and charges a fee, or commission, for its services (App. A, p. 35). For Moore and Company, the fee as a matter of policy and agreement with its agents is 7% of the gross sales price on existing residential property (App. A, p. 35).

Moore and Company markets residential property through agents known as sales associates (App. A, p. 37). The sales efforts are actually undertaken by the sales associates, while Moore and Company provides assistance in the form of office space, secretarial staff, real estate closing staff, telephones, real estate forms and other ancillary services and materials (App. A, pp. 37). Sales associates of Moore and Company, like those of other real estate firms, are separately licensed real estate salesmen or brokers (App. A, pp. 39-40). They must take and

pass state-administered examinations in order to receive their licenses in Colorado (App. A, pp. 39-40). In addition, they must meet certain prescribed classroom instruction requirements (App. A, p. 40).

Moore and Company sales associates are independent contractors and not employees (App. A, p. 40). They are paid solely on the basis of commissions they generate (App. A, p. 40). They do not have federal, state or local income taxes withheld by Moore and Company from their commission checks (App. A, p. 40). Moore and Company does not withhold Social Security (FICA) taxes from paychecks of sales associates and does not guarantee or provide them with the federal minimum wage, vacation pay, sick pay, retirement benefits, or medical, life or disability insurance (App. A, p. 40).

When a Moore and Company sales associate participates in a residential real estate sale, he or she receives a portion of

the total commission, which is normally paid by the seller (App. A, p. 40). If the sales associate handles the transaction without the participation of another sales associate, the sales associate splits the commission with Moore and Company (App. A, p. 41). If another Moore and Company sales associate is involved, the commission is divided among the sales associates and Moore and Company (App. A, p. 41). If another brokerage firm is involved, the other broker gets a share (App. A, p. 41). The commission split as between Moore and Company and one of its independent contractor sales associates in any particular transaction depends upon various factors, including the sales associate's experience and production levels, whether he or she is the listing agent or the one finding the buyer, and, if another broker is the listing broker, the total commission to be split by the various real estate agents and

brokers involved (App. A, pp. 41-42). In the case of a Moore and Company sales associate obtaining the listing, the total commission to be divided is 7% of the gross sales price (App. A, p. 42). Moore and Company usually distributes commissions to sales associates within a day or two after a real estate transaction closes (App. A, p. 42).

As independent contractor sales associates, members of the putative defendant class are responsible for their own business expenses while affiliated with Moore and Company (App. A, p. 42). The sales associate pays for his or her own automobile expenses, meal and entertainment expenses, car telephone, real estate license fees, membership dues to the various realtor organizations, insurance, and advertising costs beyond 6% of the sales associate's income (App. A, p. 42). The sales associates sometimes hire their own

employees or independent contractors (who are not affiliated with Moore and Company) to handle secretarial matters for them (App. A, pp. 42-43). It is common among Moore and Company sales associates to maintain an office in their personal residences, and they deduct a portion of their home expenses as business expense (App. A, p. 43). A first-year sales associate can expect his business-related expenses to total 20% of his or her commission income (App. A, p. 43).

Moore and Company observes the requirements of the Internal Revenue Code for obtaining the benefits of maintaining its sales force as independent contractors (App. A, p. 43). Moore and Company sacrifices the ability to control and direct the activities of its independent contractor sales staff, which control it would otherwise have over employees (App. A, pp. 44-45). Respondent Moore and Company files

tax reports with the Internal Revenue Service indicating that the commission income earned by sales associates was earned by independent contractors, not by employees (App. A, p. 43). The financial statements of Moore and Company do not treat income of sales associates as income of Moore and Company, resulting in an annual tax savings to Moore and Company of approximately $600,000 (Ex. A, pp. 43-44).

REASONS FOR GRANTING THE WRIT

1. Inconsistencies as to the Antitrust Conspiracy Standards

This case involves an issue to which the circuits have applied widely divergent legal standards. The issue of whether a plurality of actors exists for there to be a conspiracy in restraint of trade violation of Section 1 of the Sherman Act is in a state of confusion among trial and appellate courts below. This Court has recog-

nized in granting certiorari review in Copperweld Corp. v. Independent Tube Corp., 691 F.2d 310 (7th Cir. 1982), cert. granted, ___ U.S. ___, 51 U.S.L.W. 3893 (1983) (No. 82-1260) that the legal standards for determining whether related entities are capable of conspiring in violation of the Sherman Act require clarification. The instant case would be a worthy and useful companion to Copperweld and would clarify the law applicable in this regard to the real estate industry.

Appellate decisions which conflict with the opinion of the Court below include:

> Albrecht v. Herald Co., 390 U.S. 145 (1968) (newspaper distributor who was an independent contractor and newspaper circulation company held to be an antitrust co-conspirators with the newspaper).
>
> Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) (management consultant/agent for CBS held capable of conspiracy with his principal, the network).

North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 499, 74 L. Ed 2d 639 (1983) (teams of professional football league held to be separate economic entities for antitrust purposes).

Murray v. Toyota Motors Distributors, Inc., 664 F.2d 1377 (9th Cir.), cert. denied, 457 U.S. 1106 (1982) (combination and conspiracy requirement of Section 1 of the Sherman Act is to be decided by the trier of fact, rather than as a matter of law).

Tamaron Distributing Corp. v. Weiner, 418 F.2d 137 (7th Cir. 1969) (manufacturer's representative sufficiently distinct from manufacturer/principal so as to engage in an antitrust conspiracy).

Cases cited by the Court below that reached contrary conclusions, i.e., that parties were too interrelated so as to meet the plurality requirement of Section 1 of the Sherman Act, 15 U.S.C. § 1, include:

Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir.) cert. denied, ___ U.S. ___, 103 S.Ct. 362, 74 L. Ed 2d 398 (1982).

Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879 (3d Cir.), cert. denied, 454 U.S. 393 (1981).

Card v. National Life Insurance Co., 603 F.2d 828 (10th Cir. 1979).

H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978).

Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978).

The ruling below also appears to be squarely in contradiction to this Court's earlier pronouncements that efforts by parties to create separate entities for corporate and tax purposes creates the necessary separateness to establish the plurality of actors requirement for maintaining a conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968) ("[S]ince Respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of their obligations that the law imposes on separate entities."); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S.

211, 215 (1951) ("[C]ommon ownership and control does not liberate corporations from the impact of the antitrust laws."); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (affiliated corporations under common control are capable of conspiring with one another in violation of the Sherman Act). Here Moore and Company and its sales associates clearly created separate entities (a corporation distinguishing itself from independent contractor sole proprietorships) so that they could enjoy the benefits of separateness afforded by tax and corporate law. Correspondingly, they should also bear the responsibilities that federal law imposes on separate entities.

2. The Lack of Price Competition in the Real Estate Industry

The issue of whether real estate organizations can, under the Sherman Act, control the percentage and amount of com-

missions received by its independent contractor/sales agents for participating in sales of residential real estate is an important question of federal law which has not been, but should be, settled by this Court. The real estate industry of this nation is well organized and politically powerful. Over the years it has through various methods developed a system whereby it almost uniformly charges 6% to 7% of the sales price of existing residential properties for sales in which its agents participate. As was stated by the head of the Federal Trade Commission:

> You know, of course, that in most parts of the country real estate brokerage fees are rigid and uniform throughout an area--6% or 7%--with little or no competitive pricing.

Michael Pertschuk, Chairman, Federal Trade Commission, quoted in "FTC is Investigating Realty Overcharges", Washington Post, February 24, 1979 at E-3. As inflation has bloated the prices of residential housing

in recent years, real estate commissions have grown proportionately, although without commensurate increases in the quantity or quality of services performed. Real estate commission arrangements are rarely negotiated between members of that industry and home owners who purchase new residences only a few times in the course of a lifetime. "Lack of knowledge of the law and sporadic nature of the individual's impersonal interest in real estate transactions have combined to minimize an effective popular demand for antitrust enforcement [in the real estate industry]." Note, "Antitrust law: An Emerging Problem for Florida Realtors", 24 U. Fla. L. Rev. 266, 283 (1972). The Federal Trade Commission is preparing a detailed report, due in October 1983, on the anticompetitive aspects of the real estate industry.

To maximize its enjoyment of this commission income, the real estate industry

often creates separate legal entities through which to do business. Corporate real estate brokers, like Respondent Moore and Company, maintain their sales agents as independent contractors rather than as employees. This way, the corporations do not include those portions of the commissions received by the agents as corporate income for which state and federal income tax must be paid. This separateness also permits the corporations to avoid withholding wages and social security taxes (FICA) from paychecks of the sales agents. While the propriety of permitting such practices to continue from a tax policy and equity standpoint is questionable, from an antitrust perspective, this purposeful creation of separate legal entities through which to do business makes the parties to such arrangements capable of combining and conspiring for Sherman Act purposes.

A holding reversing the Tenth Circuit's affirmance of the District Court's granting the Motion for Summary Judgment would inject competitive incentives into a hitherto moribund industry in terms of consumer price alternatives. See Erxleben, "In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel", 56 Wash. L. Rev. 179 (1981). One possible result of reversal would be that a corporate real estate broker such as Respondent Moore and Company could no longer have absolute control over the full amount of the real estate commission charged homeowners, but rather could only set what its share of the commission would be. The sales agent could control his or her commission component, thus encouraging price competition as among real estate agents and companies regarding the overall commission offered consumers. In other words, a possible result of reversal

is that Moore and Company could only require its sales associates to charge a minimum commission to be received entirely by Moore and Company. Moore and Company, however, could not force or conspire with sales associates to charge a fixed amount for additional commissions to be earned by the sales associates themselves. Clearly under this possible scenario, real estate commissions might fall or services increase. The homeowning consumer public would undoubtedly benefit.

Reversal of the trial court would not outlaw all collaborative activity among real estate companies and independent contractor agents. Instead, only price-fixing of the sort alleged in the Complaint would be barred. Moore and Company could continue using sales associates, either as independent contractors or employees, but could not dictate or conspire with them with respect to their share of the total

commission. [9] Thus, reversal of the trial court would possibly enhance competition in the real estate industry, reduce uniformity in real estate commission practices and work no substantial hardship on Moore and Company's (or other realtors') future operations.

3. **Direct Benefit Exception**

There has been a growing body of anti-trust law which recognizes that corporate officers, employees and agents are capable of conspiring with their corporation in violation of the Sherman Act where they were actuated by motives personal to themselves or received a direct benefit from an arrangement violative of the Sherman Act. In such instances, the plurality requirement of Section 1 of the Sherman Act has been held to be met. See H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1977); Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531

F.2d 910, 917 (8th Cir. 1976); Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); America's Best Cinima Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); ABA Section of Antitrust Law, Antitrust Developments 1955-1968 at 19 n.84 (1968); 1 J. von Kalinowski, Antitrust Laws and Trade Regulation § 6.01[2] at 6-19 to 6-20 (1980). The contours of this emerging antitrust doctrine have not been clarified by the courts below or by this Court.

The Tenth Circuit below indicated that the personal stake doctrine does not apply to the instant case because, as that court noted, it pertains to situations where the personal stake of the corporate officer, employee or agent has a vested interest in an entity other than the corporation. How-

ever, the named plaintiffs in the instant case did identify an interest held by the Moore and Company independent contractor sales agents. Their income is derived solely from real estate commissions. They are not on salary, and they benefit personally and directly from a 7% commission structure out of which they receive a preordained percentage from sales of residential properties in which they participate in conjunction with Moore and Company. Thus, their commission income out of which Moore and Company withholds no taxes or FICA, is directly affected by the 7% commission structure. Given this "independent personal stake" in the 7% commission combination, sales associates and their commission-splitting partner, Moore and Company, should not be deemed exempt from antitrust scrutiny, certainly not at the summary judgment level. There is no precedent for the Tenth Circuit's conclusion

that the "independent personal stake" can only be indirect such as when a corporate officer owns a competing corporation. Direct benefits accruing to an agent by engaging in a price-fixing arrangement with his or her principal, as well as indirect benefits, should be sufficient to permit a plaintiff to withstand summary dismissal based upon a claimed intra-corporate conspiracy.

CONCLUSION

For the foregoing reasons, the Petition for A Writ of Certiorari should be granted with respect to each of the three questions on which it is sought.

Dated August 29, 1983.

Respectfully submitted,
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 79-M-1600

DWIGHT J. HOLTER and SANDRA A. HOLTER, individually, and on behalf of others similarly situated,

Plaintiffs,

vs.

MOORE AND COMPANY, WILLIAM M. MOORE, individually, and TIMOTHY M. MILLER, individually, and on behalf of a class composed of all other sales associates of Moore and Company acting as real estate agents for sellers of residential properties,

Defendants.

MEMORANDUM OPINION AND ORDER

Dwight J. Holter and Sandra A. Holter sold their home in Fort Collins, Colorado on August 31, 1978, using the services of Timothy M. Miller, a real estate agent associated with Moore and Company, a corporation which maintains real estate offices in a number of Colorado cities. William M. Moore is a licensed real estate broker and an officer of Moore and Company, which is an employing broker authorized to

act under the broker's license held by William M. Moore. The plaintiffs paid a 7% commission to Moore and Company on that sale and it is that commission which is the basis for this action.

The plaintiffs brought the action on behalf of all persons who sold residential properties within Colorado within four years prior to the filing of this suit and who used the services of real estate agents associated with Moore and Company for which a 7% commission was charged and paid. The plaintiffs also have sought to form a defendant class consisting of all sales associates of Moore and Company who acted as real estate agents for sellers of residential properties in Colorado within the same four-year period. After a hearing on the defendants' initial motion to dismiss under F.R.C.P. 12, the plaintiffs amended their complaint to claim relief solely on allegations of a conspiracy to fix commis-

sions in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The parties then agreed to conduct discovery limited to the relationship between Moore and Company and its sales associates as evidenced by documents and business practices during the relevant time. The premise of that agreement was that considerable time and expense could be saved by developing a discovery record adequate to permit resolution of the legal question of whether that relationship was sufficiently controlled by the defendant corporation to preclude any actionable conspiracy among the named defendants and the defendant class. That legal issue was properly raised by the defendants' motion for summary judgment which was heard on November 24, 1980. At that hearing, it was also agreed that the court should decide the motion upon the assumption that the putative classes of plaintiffs and defend-

ants would be formed as requested by the plaintiffs.

While there are some differences between the plaintiffs' and defendants' briefs in their respective recitals of the facts revealed during discovery, those differences are not deemed material. For pusposes of deciding the legal question presented, the statements of fact contained in pages 6 through 10 of the plaintiffs' brief are accepted as true, incorporated herein by this reference, and attached as an appendix to this memorandum opinion. Additionally, the affidavit of Keith T. Koske, dated June 2, 1980, submitted by the defendants, has not been challenged by the plaintiffs and it is therefore accepted as true. Upon this basis it is appropriate to find and conclude that there is no genuine issue as to any material fact and the case is, therefore, subject to disposition on the defendants' motion for summary judgment

under Rule 56 of the Federal Rules of Civil Procedure.

The accepted statements of fact reflect that the business practices of Moore and Company give associates a measure of both independence and obligation. As licensed real estate agents, authorized to act under Moore's brokerage authority, these salespersons are obligated to provide services according to Moore's guidelines, to offer the listing agreements at percentages set by the company and to sign contracts solely as agents for Moore and Company. In fact, Colorado law requires that all transactions by Moore salespersons shall be done in the name of the licensed broker, Moore and Company, as principal. C.R.S. § 12-61-109(2) (1973) and Rule E-6 of the Colorado Real Estate Commission.

On the other hand, the Moore associates do have a certain amount of independence, and some aspects of their

status with the company are more characteristic of an independent contractor than an employee. They are compensated only by commissions, and since Moore considers them to be independent contractors for tax purposes and does not withhold anything from the commission checks, they are responsible for full payment of their own income taxes, retirement plans and medical insurance. Moore does pay for and provide furnished office space, secretarial services, telephone service, documentary forms, and experienced clerical assistance in closing transactions. The associates pay some of their own expenses, including travel and entertainment expenses and occasionally must pay for supplemental secretarial and clerical services.

The plaintiffs contend that there are sufficient indicia of independence to support a charge of an unlawful conspiracy under Section 1 of the Sherman Act, in

derogation of the general rule that a corporation cannot conspire with its officers or agents to violate that statute. See H & B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 (5th Cir. 1978) and Jos. Seagram & Sons v. Hawaiian Oke and Liquors, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062.

In support of their argument, the plaintiffs cite cases in which corporations were held to have conspired with their subsidiaries or affiliates, and cases in which coercive activity to effectuate retail price maintenance has been found to constitute a vertical conspiracy. U.S. v. Yellow Cab, 332 U.S. 218 (1947), Kiefer-Stewart Co. v. Jos. Seagram & Sons, Inc., 340 U.S. 211 (1951), Simpson v. Union Oil Co., 377 U.S. 13 (1964). Additionally, they urge adoption of a test suggested in the opinion from the Fifth Circuit in H & B Equipment Co., supra, where no conspiracy

was found but the court noted that one might exist of an agent had an "independent personal stake in achieving the object of the conspiracy." 577 F.2d at 244. The plaintiffs urge that the Moore associates have the required "independent personal stake" in the 7% commissions, and thus can be held to have conspired with Moore and Company to maintain that percentage.

I am not persuaded by that argument. Antitrust liability is governed by considerations of economic policy, not by labelling. Agents are not independent for purposes of Section 1 simply because they are paid by commissions or have no income taxes withheld. American Oil v. McMullin, 508 F.2d 1345 (10th Cir. 1975). Payment on commissions may give the associates a "personal" stake in the business to a greater extent than a salaried employee, but it does not create an "independent" personal stake.

In Card v. National Life Insurance, 603 F.2d 828 (10th Cir. 1979), Judge Doyle applied the McCarran-Ferguson Act exemption from antitrust liability for an insurance business, and observed that the general agents who were members of an agents' association could not conspire with the company which was their principal in an agency relationship which gave much more independence than is the case here. While the case is not controlling precedent, Judge Doyle's comments and the concurring opinion of Judge McKay are a clear indication of the view of conspiracy which prevails in the Tenth Circuit Court of Appeals. That view is shared by the Ninth Circuit Court of Appeals in Jos. Seagram & Sons v. Hawaiian Oke and Liquors, supra.

Care should be taken in considering a motion for summary judgment in an antitrust case and the motion must be denied if there is any suggestion that the plaintiff could

establish liability. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1972). However, where there has been a full opportunity to develop the facts relevant to a pivotal question of law, summary judgment may be granted. That is true in this case. The plaintiffs cannot establish the conspiracy necessary to support their claim under Section 1 of the Sherman Act. It is, therefore,

ORDERED, that the defendants' motion for summary judgment is granted, the amended complaint is dismissed, and judgment shall enter for the defendants with costs to be taxed on the filing of a bill of costs within ten days.

Dated: _____

BY THE COURT:

_____
Richard P. Matsch, Judge
United States District Court

D. Moore and Company and Its Relationship with Sales Associates.

The facts which are especially pertinent to the Motion for Summary Judgment, taken in a light most favorable to the plaintiffs, are as follows:

Defendant Moore and Company is a general real estate brokerage firm specializing in residential, commercial, industrial and investment sales. Approximately 80 percent of its business relates to residential sales (Exhibit A). Like other real estate firms in the State and around the country, Moore and Company brings together buyers and sellers of residential real estate and charges a fee for its services. See generally Case, "Why Some Brokerage Firms are Successful", 9 Real Estate Review 103 (Fall 1979). For Moore and Company, the fee is invariably 7% of the gross sales price on existing (as opposed to new) residential property (Exhibits B, C and D). Some other real

estate companies charge different commission rates or are willing to negotiate commission fees (Exhibits E and F).

Moore and Company is the second largest real estate broker in Colorado (Exhibit G). It is the largest broker in the state that markets homes through sales associates who are independent contractors (id.). The goal of Moore and Company is to capture 25% of the market in the State (Exhibit H). It has already achieved this goal in Loveland, Breckinridge and Dillon, and is presently the leading realtor in terms of volume in Ft. Collins, although it has not yet acquired a 25% market penetration there (id.). In 1977, Moore and Company and its sales associates earned $14,012,212 in commissions, of which sales associates received $7,370,546 (Exhibit I). In 1978, those figures increased to $15,052,562 and $8,314,889, respectively (id.).

Moore and Company markets residential properties through sales associates. The selling efforts are actually undertaken by the sales associates, while Moore and Company provides assistance in the form of office space, secretarial staff, real estate closing staff, telephones, real estate forms, and other ancillary services and materials. The following interrogation of William M. Moore at his deposition reveals the mechanics of a typical residential real estate transaction involving Moore and Company and its sales associates:

> Q Focusing your attention on residential sales, would you please describe the mechanics of a residential real estate transaction, with particular attention to the role of the broker and the role of the sales associate, as these transactions are handled by Moore and Company. Do you understand that?
>
> A Yes, I believe I do. Well, the sales associate obtains a listing, exclusive right to sell listing generally, and a copy of that listing agreement is kept in the files of the

branch office. And then the sales associate proceeds to market that property through advertising, through M.L.S., through a prospect list, sphere of influence, et cetera, and the majority of the time an offer to purchase will be generated on that particular property through another sales associate, either inside the office or another company -- a salesman with another company.

Our sales associate, who is the listing agent, let's say, in this particular case, presents the contract to his client, the seller, and oftentimes the other agent who has been working with the purchaser attends that meeting -- sometimes not. And as and when a receipt and option contract is executed and completed by all parties, copies go to all principals and to all sales associates and companies involved.

From that moment, the sales associate is responsible to follow tha transaction to the consummation. That may be a new FHA or VA or conventional type loan, wherein he assists the purchaser in making a loan application at a lending institution. He assists getting any documentation that the lender might need, such as a veteran's certificate in the case of a VA loan. Oftentimes he helps in

obtaining documents such as verification of employment and things that lenders need.

Then the sales associate is encouraged and requested to attend the consummation or the settlement of the closing, and completes the transaction by picking up the lock box, picking up the sign, the "Sold" sign, maybe a little bit after it is consummated.

Q What does Moore and Company do as the broker?

A Well, Moore and Company provides in most offices the closing procedure, with a closing girl that is obtaining realty documents, possibly with the help of the associates if there is any running around to do to pick them up.

And Moore and Company provides the settlement sheet, acts as the clearing house, collects all moneys, pays out all moneys to the title companies, water bills, Public Service bills, sellers' proceeds, payoff statement from the existing or previous lender.

Deposition of William M. Moore (Vol. 1), taken July 29, 1980, at 33-34.

Sales associates are licensed real estate salesmen or brokers. They must take

and pass state-administered examinations in order for them to receive their licenses. C.R.S. 1973, § 12-61-103. In addition, they must meet certain prescribed classroom instruction requirements. Id.

Moore and Company sales associates are independent contractors and not employees of Moore and Company (Exhibit J). There are about 300 of them conducting business out of 21 branch offices (id.). They are paid solely on the basis of commissions they generate (Exhibit K). They do not have federal, state or local income taxes withheld by Moore and Company from their commission checks (Exhibit L). Moore and Company does not withhold social security taxes from pay checks of sales associates, and does not guarantee or provide them with the federal minimum wage, vacation pay, sick pay, retirement benefits, or medical, life or disability insurance (Exhibits L, M, N).

When a Moore sales associate participates in a residential real estate sale, he or she receives a portion of the total commission, which is normally paid by the seller. If the sales associate handles the transaction without the participation of another sales associate, the sales associate splits the Commission with Moore and Company. If another Moore sales associate is involved, the commission is divided among the sales associates and Moore and Company. If another broker is involved, the other broker gets a share. See generally, Exhibits O and P. In brief, the amount of commission received by a Moore sales associate depends upon various factors including the sales associate's experience and production levels, whether he or she is the listing agent or the one finding the buyer, and, if another broker is the listing broker, the total commission to be split by the various real estate

agents and brokers involved. (In the case of a Moore sales associate obtaining the listing, the total commission to be divided is 7% of the gross sales price.) Moore and Company usually distributes commissions to sales associates within a day or two after a real estate transaction closes (Exhibit Q).

As independent contractor sales associates, members of the putative defendant class are responsible for their own business expenses while affiliated with Moore and Company. The sales associate pays for his or her own automobile expenses, meal and entertainment expenses, car telephone, real estate license fees, membership dues to the various realtor organizations, insurance and advertising costs beyond 6% of the sales associate's income (Exhibit R). In fact, sales associates sometimes hire their own employees or independent contractors (who are not affiliated with Moore

and Company) to handle secretarial matters for them (Exhibits R, S and T). It is common among Moore sales associates to maintain an office in their personal residences, and they presumably deduct a portion of their home expenses as a business expense (Exhibit U). A first-year sales associate can expect his business-related expenses to total 20% of his or her commission income (Exhibit V).

Moore and Company tries to observe the requirements of the Internal Revenue Code and the Internal Revenue Service ("IRS") for obtaining the benefits of maintaining its sales force as independent contractors. See generally, Stand. Fed. Tax Rep. (CCH) ¶ 4939 (1980). Moore and Company files tax reports with the IRS indicating that the commission income earned by sales associates was earned by independent contractors, not by employees (Exhibit W). The financial statements of Moore and Company

do not treat income of sales associates as income of Moore and Company (Exhibits X and Y), and the company implements policies which seek to minimize the possibility that the IRS will treat sales associates as employees for income tax and social security purposes (Exhibits Z, AA and BB). Moore and Company saves itself approximately $600,000 annually by treating its sales associates as independent contractors (Exhibit BB).

In order to secure the tax, social security and other benefits of maintaining its sales associates as independent contractors, Moore and Company must sacrifice its ability to control and direct the activities of its sales staff. As the Controller and Secretary-Treasurer of Moore and Company states:

> If the tax consequences were the same, I would prefer that they [Moore sales associates] were employees. You always have the problem of maintaining

> this independent contractor status, and because of the way we operate, that is very divvicult.
>
> And we could more closely direct their activities, you know, more -- you know, "You will be to work at eight." I mean, you know, "You will ....." -- those kinds of things. We could more closely direct their activities, and that is my -- so I would really prefer that they were employees from that standpoint, from an operations standpoint.

Deposition of Robert Williams, taken September 3, 1980, at 36.

Requirements imposed on sales associates are minimal. Aside from following common-sense grooming and business clothing standards, sales associates are expected to attend occasional meetings of the sales force and meet production goals. Such requirements, however, are couched in terms of nonobligatory expectations, and for a high producing sales associate all is forgiven. Sales associates have no fixed office hours and no routine schedule (Exhibits CC and DD). In the words of one

former Moore and Company sales associate, with the exception of Wednesday sales staff meetings that occupied perhaps the entire morning, sales associates could come and go as they pleased (Exhibit CC). Paraphrasing the President of Moore and Company, sales associates are not required to do anything; it is simply in the mutual best interests of Moore and Company and its sales associates that Moore guidelines are observed (Exhibit DD).

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DWIGHT J. HOLTER and SANDRA A. HOLTER, individually and on behalf of others similarly situated,	)	
Appellants,	)	
vs.	)	No. 81-1088
MOORE AND COMPANY, WILLIAM M. MOORE, individually, and TIMOTHY M. MILLER, individually, and on behalf of a class composed of all other sales associates of Moore and Company acting as real estate agents for sellers of residential properties,	)	
Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 79-M-1600)

Phillip S. Figa (with Hugh A. Burns on the brief) of Burns & Figa, P.C., Denver, Colorado, for Appellants.

James M. Lyons (with James R. Everson on the brief) of Rothgerber, Appel & Powers, Denver, Colorado, for Appellees.

Before HOLLOWAY, McKAY and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

Appellants sold their house through defendant Moore and Company (a Colorado real estate broker) and one of its licensed sales agents. Moore charged them its standard seven percent commission for the sale. They then brought this antitrust suit against Moore, its president, and all of Moore's sales agents on behalf of themselves and a class of plaintiffs similarly situated. They alleged that the seven percent commission Moore charges for sales of residential housing and the acquiescence in that rate by Moore's sales agents is resale price maintenance between Moore and the agents as well as horizontal price fixing among the agents. The trial court granted the defendants' motion for summary judgment. It held as a matter of law that Moore and the agents constitute a single economic entity incapable of conspiring under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

Section 1 of the Sherman Act can be violated only by concerted action by a plurality of actors. Blankenship v. Herzfeld, 661 F.2d 840, 846 (10th Cir. 1981). Since a corporation has no way of acting except through officers and employees, the officers and employees are part of the same economic unit as the corporation for antitrust purposes. Thus, officers and employees of a corporation are generally incapable of conspiring with the corporation or with each other.[1/] Schwimmer v. Sony Corp. of America, 677 F.2d 946, 953 (2d Cir. 1982); Tose v. First Pa. Bank, 648 F.2d 879, 893-94 (3d Cir.), cert. denied, 454 U.S. 893 (1981); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978). In addition, antitrust defendants with separate legal labels -- e.g., corporation-agent -- are not

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1. But see post n.8.

always capable of conspiring; they must be separate economic entities in substance as well. See Card v. National Life Insurance Co., 603 F.2d 828, 834 (10th Cir. 1979) (general insurance agents incapable of conspiring with insurance company). Thus, even though Moore's sales agents are taxed as independent contractors, that fact is not dispositive of this case. While a corporation acting through its officers and employees can conspire under section 1 with some outside contractors, we face here an antecedent question: whether the licensed real estate agents employed by the broker are employees or outside agents for purposes of the Sherman Act.[2/]

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2. If we determined that the agents were sufficiently independent of Moore to be "outside" contractors, there would still be a difficult question to resolve since the cases reflect uncertainty as to when outside agents are capable of conspiring with their principle for purposes of § 1 of the Sherman Act. Compare Albrecht v. Herald Co., 390 U.S. 145 (1968) with Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978). We need not reach the problems raised by the outside contractor cases since we find that Moore's sales agents are not "outside contractors."

Whether the relationship of the parties is employer-employee or principal-outside agent is normally a question of fact. See Blankenship v. Herzfeld, 661 F.2d at 846. However, the sufficiency of the evidence to create an issue of fact for the jury is solely a question of law. See Ogilvie v. Fotomat Corp., 641 F.2d 581, 589-90 (8th Cir. 1981); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 (1971). Keeping in mind that summary judgment should be granted sparingly in antitrust cases, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), we must determine whether there was sufficient evidence in the record to create an issue of fact for the jury on whether the defendants were separate vertical and horizontal economic units rather than a firm and its employees.

Although existing cases dealing with the "single enterprise" doctrine have been

criticized as lacking in certainty,[3/] we think that the immense diversity of methods of organization and types of products makes some uncertainty unavoidable, relegating us to general guidelines and case-by-case resolutions. Some courts have attempted to set forth generalized tests for determining when formally distinct entities are in fact separate economic entities for antitrust purposes. See, e.g., Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1031 N.5 (2d Cir.), cert. denied, 444 U.S. 917 (1979). While we recognize that some of these criteria are at least in part question-begging, they nonetheless help to focus the inquiry, which centers on the independence of the allegedly conspiring actors.

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3. See Note, "Conspiring Entities" under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661 (1982). Even the critics, however, confess an inability to devise a clear test of their own. Id. at 680.

The starting point in this case is the law of Colorado under which the parties operate.[4/] Of course, state labels describing the relationship between the parties do not govern our application of a federal standard to determine whether the parties are separate economic entities. In this case, however, we look to state law as it actually limits the independence of the sales agents from Moore.[5/] The sales personnel in this case are called "agents."

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4. By considering the state law under which the parties operate, we are simply examining the undisputed facts to determine whether the agents are Moore's "employees" under the doctrine that holds an employee incapable of conspiring with his corporate employer under § 1 of the Sherman Act. We are not invoking the immunity doctrine of Parker v. Brown, 317 U.S. 341 (1943).

5. By rendering a corporation capable of acting only through its employees, a state's corporation law renders the corporation and the employees incapable of acting independently of each other hence incapable of conspiring under § 1. Similarly, state law can render an agent capable of acting only under the supervision of a single employer, precluding the agent from acting independently of, or conspiring with, the employer. In either case, a federal standard of separateness governs.

However, a sales agent must have a license to sell real estate, Colo. Rev. Stat. § 12-61-102 (Supp. 1982), and he can obtain one only if he has an agreement to be hired by a broker, see id. § 12-61-103(5). He may not work for any other broker.[6/] The agents may perform real estate services only in the broker's name, 4 Colo. Admin. Code § 725-1E-6 (1983), and all compensation for services must be paid to the broker -- not to the agent, see Colo. Rev. Stat. § 12-61-117 (1978). Finally, a "real estate broker shall not contract with the licensees in his employ so as to lose his authority to supervise [them]," 4 Colo. Admin. Code § 725-1E-9 (1983), and a broker can lose his license for "failing to exercise reasonable supervision over the activities of his

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6. Colorado law precludes a sales agent from working for more than one broker by (a) limiting each agent to one license, Colo. Rev. Stat. § 11-61-109(4) (Supp. 1982), and (b) requiring an agent's license to be in the custody of his broker, id. § 11-61-104(1) (1978).

licensed employees," Colo. Rev. Stat. § 12-61-113(1)(o) (1978).

In addition to this legally required supervision, Moore supplies offices, secretaries, and real estate listings, and pays some expenses for the licensed agents. The appellants rely on the following indicia of economic separateness: (a) the agents are paid a commission, (b) Moore withholds no income or FICA taxes, or retirement benefit payments from the commissions, (c) each agent must be licensed by the state, (d) agents control their own hours, and (e) the agents pay some of their own expenses.

Our judgment is that the Colorado statutory scheme restricts the independence of the agents so much that they must be considered "employees" under section 1 of the Sherman Act. The Colorado provisions simply do not allow the agents to take any independent course of action that would be

competitive with Moore. The nature of the relationship that Moore and the agents are legally required to maintain is so overwhelmingly one of the superior and subordinate that the indicia relied on by the appellants are inconsequential. Payment by commission and the agents' concomitant incurrence of some costs are not dispositive factors in determining whether there is one or many entities. See American Oil Co. v. McMullin, 508 F.2d 1345, 1351-52 (10th Cir. 1975). The requirement that the agents have licenses is consistent with their status as employees; it is no different from the case of beauticians employed by a single beauty parlor, Colo. Rev. Stat. § 12-8-120(2) (1978), or associates employed by a law firm, id. § 12-5-112. The agents' control over their hours, although a discretion not enjoyed by all employees, does not evidence sufficient independence to counteract the require-

ments that the agents work only for Moore, offer all of their services in Moore's name, be compensated only by Moore, and contract with Moore only in a way that enables Moore to have enough control to perform its duty to supervise them. Similarly, the agents' "independent contractor" label for tax purposes does not negate the substantial control that Moore is legally obligated to exercise over the agents' performance of their employment. Thus, when the components of the relationship are examined individually and collectively, we agree with the Colorado Supreme Court that the Colorado real estate laws require Moore and its agents to maintain "an employer-employee relationship because it [not only] clothes the broker ... with the right to control his salesmen but it also charges him with a duty to do so." Faith Realty & Development Co. v. Industrial Comm'n, 170 Colo. 215, 460 P.2d 228, 230 (1969).

We conclude that the agents should be considered employees of Moore for antitrust purposes.[7/] It follows that the agents cannot conspire with Moore or each other absent invocation of the "independent personal stake" doctrine, which is inapplicable to this case.[8/]

AFFIRMED.

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7. This holding forecloses the appellants' argument that the appellees are capable of conspiring as joint venturers. Of course, it does not effect the applicability of § 1 of the Sherman Act to concerted action by more than one broker or agents of different brokers.

8. Some courts have held that an officer of a corporation can conspire with the corporation if the officer will personally benefit from conspiring with the corporation to restrain trade. E.g., H & B Equip. Co. v. International Harvester, 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974). This "independent personal stake" doctrine applies only when the officer has an outside economic interest, such as ownership of a competing corporation, through which he will benefit from the restraint. The appellants have not identified any such outside interest held by the agents. Thus, the doctrine does not apply to the facts of this case.